rejected the contention of counsel for the chargee that the only way to set aside such an order was by a fresh action if, *inter alia*, grounded on fraud. He thought that since the matter had not been adjudicated and the court had not pronounced a judgment upon the merits or by consent, he had the power to do what he did. He gave as his authority the case of *Evans* v. *Bartlam*[1] and he cited the oft-quoted dictum of Lord Atkin therein on a judgment obtained by a failure to follow any of the rules of procedure.

But though he himself observed that in this dictum Lord Atkin was discussing the jurisdiction of the judge to set aside a judgment obtained by default, he failed to see that in this case the order was not obtained because of the default of the other party. He had the same material before him at the first foreclosure proceeding and quite clearly he should have considered himself *functus officio* after having considered the contentions raised at this proceeding and refused to do anything about it on the ground of lack of jurisdiction and he should have left it to the respondent to commence a fresh action to set aside the foreclosure order on the ground of fraud. The right practice was pointed out to him and his attention was drawn to the cases directly in point. Unless he could distinguish them, he was bound by them.

Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St. Nazaire Co.*,[2] *Kelsey* v. *Doune*;[3] *Hession* v. *Jones*,[4] unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong* v. *Neotia & Co.*[5] and *Jonesco* v. *Beard*.[6] The hearing of the action will in a proper case be expedited: *Smith* v. *Peizer*.[7]

For these reasons, we allowed the appeal with costs and restored the original order made in the foreclosure proceeding.

We have observed that the fresh action necessary to set aside the order on the ground of fraud has been commenced. All that the respondent requires are a stay of the foreclosure proceeding and an expedition of the hearing of the fresh action.

Fortunately for the respondent, we have been able to overcome the reluctance of counsel for the chargee and to prevail on him to agree to a stay. This would save the solicitors for the chargor having to make the application to the court.

The Chief Justice, Borneo assures the parties that he will entertain an application for an early date of hearing when the pleadings close and all the pre-trial procedures have been taken.

Appeal allowed.

Solicitors: *Wan Ullok, Jugah, Chin & Co.; Szetu & Co.*

YAP EE KONG & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) Wan Suleiman F.J., Abdul Hamid F.J. & Hashim Yeop A. Sani J.) November 17, 1980]

Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1980]

Criminal Law and Procedure — Conviction on evidence of accomplice — Corroboration — Reference to Federal Court — Hearing as an appeal — Penal Code, s. 193 — Courts of Judicature Act, 1964, s. 66(1).

In this case the appellants were charged in the Sessions Court with abetting the offence of perjury under section 193 of the Penal Code allegedly committed by one Othman bin Ahmad. At the trial Othman bin Ahmad gave evidence on the alleged influence of the appellants to "tell lies in court." In support of his evidence the prosecution called the wife of Othman bin Ahmad and the superior officer of Othman, who both gave evidence of statements made by Othman to them. The learned President of the Sessions Court held that the defence had cast reasonable doubt on the prosecution case and he acquitted the appellant but on an appeal by the Public Prosecutor the learned judge of the High Court convicted the appellants as he found that the superior officer of Othman was an independent witness and his evidence corroborated that of Othman. Application was made to the learned judge to reserve for the decision of the Federal Court questions of law of public interest which had arisen in the course of the appeal but this was refused. Application was then made by way of criminal reference to the Federal Court, which heard the application and dealt with the matter as on appeal. The question considered by the Federal Court in relation to the first appellant was "whether corroboration is provided by proof of consistent statements made out of court before trial." In relation to the second appellant the question was "Where a person is charged with abetting an offence under section 193 of the Penal Code can the evidence of an accomplice be corroborated by what the accomplice is alleged to have told his wife or his superior officer after the offence had been committed?"

Held: (1) the evidence against the second appellant was based on the bare statement of an accomplice and it was a serious misdirection on the part of the appellate judge to consider the previous statement of an accomplice as corroboration;

(2) as regards the first appellant there was hardly any evidence against him in the first place and the question of corroboration did not arise;

(3) on the facts of the case the answers to both the questions posed must be in the negative. It followed that the convictions recorded by the appellate judge against both the appellants should be quashed.

Cases referred to:-

(1) *Sim Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200.

(2) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.

(3) *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349.

(4) *R.* v. *Baskerville* [1916] 2 K.B. 658.

(5) *Reg.* v. *Malapa Bin Kapanu & Ors.* I.L.R. [1874] B. 196, 197.

(6) *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296, 315.

FEDERAL COURT.

E. Joseph Jr. (*G.S. Nijhar* with him) for the 1st appellant.

R.R. Chelliah (*G. Sri Ram* and *P. Vijendran* with him) for the 2nd appellant.

Shaik Daud bin Haji Mohamad Ismail (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): This was a reference under section 66(1) of the Courts of Judicature Act, 1964 (Revised Act 91). There were many questions posed for this court to answer. However, at the outset of the hearing we decided to confine ourselves to the question of corroboration only and that the hearing to proceed as an appeal as well: see *Sim Tiew Bee* v. *Public Prosecutor;*[1] *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor;*[2] and *Attorney-General for Northern Ireland* v. *Gallagher.*[3]

The question relevant for our consideration in relation to the first appellant is Question No. 3 in his notice of motion which reads as follows: —

"3. Whether corroboration is provided by proof of consistent statements made out of court before trial?"

The corresponding question in relation to the second appellant is Question No. 3 in his notice of motion, to wit:

"3. Where a person is charged with abetting an offence under section 193 of the Penal Code can the evidence of an accomplice be corroborated by what the accomplice is alleged to have told his wife or his superior officer after the offence had been committed."

The background facts of this case are briefly as follows. One R.K. Menon (a legal practitioner) and Yap Ee Kong (a broker) were charged with abetting the offence of perjury under section 193 of the Penal Code allegedly committed by one Othman bin Ahmad, an immigration officer. What was alleged to be the perjured statement was the statement made in the Magistrate's Court, Johore Bahru, by the said Othman bin Ahmad during the trial of the said Yap Ee Kong on October 15, 1975 and October 22, 1975 for an offence under section 97 of the Road Traffic Ordinance 1958. The statement was that the $10 paid by the said Othman to the said Yap Ee Kong on December 4, 1974 was for "petrol money" and not rental of a vehicle contrary to the statement previously made by the said Othman to the police which was that the $10 was for rental of the vehicle. It is to be noted however that it is not stated anywhere in the records that the said Othman bin Ahmad has ever been convicted under section 193 of the Penal Code. During the prosecution of Menon and Yap the said Othman bin Ahmad gave his evidence on the alleged influence of both Menon and Yap for him "to tell lies in court." In support of his evidence the prosecution called his wife (PW7) to testify to the effect that on his return from court on October 15, 1975 her husband told her that he had told lies in court and that the 1st accused (Menon) had asked him to do so. PW7 further testified that on the following day, i.e. October 16, 1975, Yap came to their house at about 9.30 a.m. and when she asked her husband what was the purpose of the visit, the husband replied that "Yap had asked him to say the same thing" and that he had also told her that Menon had also asked Yap to tell him (Othman) to say the same. Another witness brought by the prosecution to support Othman's evidence was Othman's superior officer (PW4). According to PW4 Othman came to see him some time in October 1975 (in fact one week after the trial) and said that he had given evidence in court contrary to the statement he made earlier to the police and that he had done so because he was directed by a lawyer "one Mr. Menon to give false evidence."

According to the judgment of the learned President who heard the case (at page 69 of the record) he warned himself of the danger of acting on the uncorroborated evidence of PW5 (Othman bin Ahmad) whom he regarded as an accomplice. However, on the strength of what he called "supportive evidence" of PW7 (the wife) coupled with "other relevant evidence" he made a finding that a *prima facie* case was established against both Menon and Yap in respect of the 1st and 3rd charges. The defence called 8 witnesses including the complainant himself and PW7. After hearing the defence the learned President held that in the light of the defence evidence he was very much in doubt as to the truth of PW7's testimony. He gave his reasons and findings as follows:

"As mentioned earlier, though her testimony cannot be considered as corroborative, but it is supportive of the prosecution's case. Now, however, her credit and character has been put in question; *thus created doubt in my mind.* The benefit of the doubt should therefore go to the accused.

Accordingly, it is *my finding* that the defence has cast reasonable doubt on the prosecution case." (emphasis mine).

The learned Public Prosecutor appealed. At the conclusion of the appeal the learned judge made his own conclusions. He agreed with the learned President that the evidence of Othman bin Ahmad should be treated as that of an accomplice. Apparently he also agreed with the learned President that a *prima facie* case was established based on the evidence of Othman supported by the evidence of his wife (PW7). The learned judge thought that the learned President failed to consider PW4, Francis Frederick's evidence in arriving at his finding. We do not think that the learned President overlooked PW4's evidence in making his finding of a *prima facie* case because he clearly said in his judgment that he considered PW7's evidence "coupled with other relevant evidence" before him which must necessarily include PW4's evidence. The learned judge went further in his judgment and said in his view the evidence of PW4 is good corroboration on the grounds that PW4 is an independent witness and had no interest in the case.

On examining the background facts as a whole we feel that this view of the learned judge amounted to serious misdirection in law. First, it is not disputed that Othman was an accomplice. It is trite law that although an accomplice is a competent witness a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. All leading authorities have stated in clear terms that it has long been a rule of practice or rule of prudence which has become virtually equivalent to a rule of law for the judge or jury to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence except where circumstances make it safe to dispense with it that there must be corroboration of the evidence of an accomplice. In the much quoted case of *R.* v. *Baskerville*[4] Lord Reading C.J. speaking of the rule of practice accepted "as virtually equivalent to a rule of law" requiring corroboration in this type of cases said:

"If after the proper caution by the judge the jury nevertheless convict the prisoners, this court will not quash the conviction merely on the ground that the accomplice's testimony was uncorroborated.... In considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this court, in the exercise of its powers will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this court, *after considering all the circumstances of the case, thinks the verdict unreasonable or that it cannot be supported having regard to the evidence.*"

In other words, the evidence of Othman bin Ahmad in this case must be received with the greatest possible caution as it is not unlikely that he would give untruthful evidence under the circumstances. Therefore the nature and extent of corroboration is relevant. The rules are lucidly expounded by Lord Reading in *Baskerville's* case, *supra*. The rules may be formulated as follows:

(1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

What was the evidence which the learned judge thought was "good corroboration"? From the records it would be seen that PW4 testified that one morning some time in October 1975 (complainant himself said it was one week after October 10, 1975) he was approached by the complainant who said that he had told lies in court as directed by the lawyer. That in fact was the statement made by the complainant to PW4 which incriminated Menon. The records also reveal that not only that it was a statement (the falsity of which has not in fact been proven) made to a superior officer one week after he had made the statement in court; there is in the evidence of the complainant himself that after October 22, 1975 the Deputy Public Prosecutor was looking for him and he also said in court that he was afraid of losing his job if he was charged and be convicted of perjury. Those are some of the circumstances which must be examined before the court can regard PW4's evidence to be of any corroborative value. A previous statement by an accomplice would still be a statement by an accomplice and does not increase its value by repetition. Dealing in a similar situation the court in *Reg.* v. *Malapa Bin Kapana & Ors.*[5] said:

"From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent reliable evidence. But his statement, whether made at the trial or before the trial and in whatever shape it comes before the court, is still only the statement of an accomplice and does not at all improve in value by repetition."

However, some Indian decisions have held that such previous statements would amount to corroboration but the weight would vary with the circumstances of each case. In the present case it can be seen that the weight would be adversely affected because of the circumstances under which the statement was made to PW4 as mentioned earlier. In our view the statement made by Othman bin Ahmad to PW4 must necessarily be considered as unsafe as supportive evidence much less as corroboration because such statement was probably tainted with motives to shift the blame to someone else.

Another aspect of the law relating to accomplice's evidence is whether corroboration is at all necessary where the evidence of the accomplice is itself uninspiring and unacceptable. From the facts of the present case it can be seen from the records that in so far as the offence against the first appellant, Yap Ee Kong, is concerned, there is absolutely no evidence against him. In such a situation the principles enunciated by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions* v. *Hester*[6] should be applied: "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence." Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring and unacceptable then corroboration would be futile and unnecessary. In the present case before us in view of the fact that there is hardly any evidence against the first appellant worthy of consideration, the question of corroboration did not arise.

It was our conclusion therefore that on looking at the records of this case the evidence against the second appellant was based on the bare statement of an accomplice and it was a serious misdirection on the part of the appellate judge to consider the previous statement of an accomplice as good corroboration. As regards the first appellant there was hardly any evidence against him in the first place and the question of corroboration did not arise. On the facts of this case the answers to both the questions posed are therefore in the negative. It follows therefore that the convictions recorded by the appellate judge against both the appellants should be quashed.

Accordingly, the convictions were quashed and sentences set aside.

Convictions quashed.

Solicitors: *R.R. Chelliah Bros.; Chua Bros. & Azzat.*